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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 415

BELRIDGE OIL COMPANY, a California corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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vs.

CITY OF LOS ANGELES, a municipal corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellant appeals from a judgment of the Supreme Court of the State of California which reversed a judgment for appellant entered by the Superior Court, Los Angeles County. The District Court of Appeal, Second Appellate District, had previously affirmed the Superior Court's judgment.

Opinions Below.

(a) The opinion of the California Supreme Court is reported in 42 Cal. 2d 823, 271 P. 2d 5, one justice dissenting. The opinion of the District Court of Appeal is not officially reported, but is unofficially reported in 260 P. 2d 217. Copies of both opinions are attached

hereto as Appendix A. The Superior Court rendered no opinion. A copy of the judgment of the California Supreme Court is at the end of its opinion, Appendix A. [See Clerk's Certificate attached to Record herein.]

Jurisdiction.

(b) (i) The action was brought by the City of Los Angeles under Section 21.11 of its License Ordinance (Ord. 77,000, Chap. 2, Art. 1 of the Los Angeles Mun. Code) to recover license taxes alleged to be imposed upon appellant for the years 1948, 1949 and 1950 by Section 21.166 of the License Ordinance. There was drawn in question the validity of Section 21.166 of the License Ordinance on the ground of its being repugnant to the Constitution of the United States, and the decision of the California Supreme Court was in favor of its validity.

(ii) The judgment of the California Supreme Court was entered on May 26, 1954. The order of that court denying appellant's timely petition for rehearing was entered on June 23, 1954. Appellant's Notice of Appeal to the Supreme Court of the United States was filed in the California Supreme Court on August 20, 1954.

(iii) The jurisdiction of the Supreme Court of the United States is conferred by Title 28, United States Code, Section 1257(2).

(iv) Subject to the matters hereinbelow discussed in the statement of the case, the following cases are believed to sustain the jurisdiction:

Finality of Judgment: *Richfield Oil Corp. v. State Board* (1946), 329 U. S. 69.

Statute of any state: *King Mfg. Co. v. Augusta* (1928), 277 U. S. 100.

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Repugnancy to Constitution drawn in question: *New York ex rel. Bryant v. Zimmerman* (1928), 278 U. S. 63; see *Charleston Assn. v. Alderson* (1945), 324 U. S. 182, 185-186.

Decision in favor of validity: *Fiske v. Kansas* (1927), 274 U. S. 380.

Substantial question: *Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123; *Louisville and Jeffersonville Ferry Company v. Kentucky* (1903), 188 U. S. 385; *James v. Dravo Contracting Co.* (1937), 302 U. S. 134; *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434.

(v) The validity of a statute of the State of California, namely, Section 21.166 of the License Ordinance of the City of Los Angeles (Ord. No. 77,000, Chap. 2, Art. 1 of the Los Angeles Mun. Code) is involved. [Compl. pp. 1, 2, Ex. A; Stip. as to Facts, p. 2; App. C hereto.]

The City of Los Angeles derives its power to levy license taxes from the provisions of the Constitution of the State of California (Cal. Stats. 1951, p. v) granting such a city control over its "municipal affairs," the provisions of the Charter of the City of Los Angeles being restrictive only. (*West Coast Advertising Co. v. San Francisco* (1939), 14 Cal. 2d 516, 95 P. 2d 138; *Franklin v. Peterson* (1948), 87 Cal. App. 2d 727, 197 P. 2d 788.) The pertinent provisions of the California Constitution (*supra*) are set out in Appendix B hereto. None of such provisions nor any California statute nor any decision of the California Supreme Court purports to give the City of Los Angeles any power to levy a tax upon any event occurring outside its boundaries.

The pertinent provisions of Section 21.166 of the License Ordinance are as follows:

> "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at whole, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition thereto, the sum of 40c per year for each additional $1,000 of gross receipts, or fractional part thereof, in excess of $20,000; . . ."

The full text of Section 21.166, together with the text of some other sections which affect the application of Section 21.166, is set out in Appendix C hereto.

Question Presented.

(c) (i) The question presented by this appeal is:

Whether Section 21.166 of the License Ordinance of the City of Los Angeles was invalid under the due process and/or equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States (U. S. C., Const., Amend. 14, Sec. 1) as applied to appellant for the years 1949 and 1950, because it imposed a business license tax on appellant as a person engaged in the business of selling merchandise at wholesale, measured by appellant's total gross receipts, where the total gross receipts were far in excess of the portion of such gross receipts fairly attributable to any activities conducted by appellant in the City of Los Angeles, and most of appellant's activities were conducted outside the City, and all its sales, as well as production and delivery, took place outside the City.

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Statement of the Case.

(d) In conjunction with its statement of the case appellant deems it appropriate to express to the Court its belief that the judgment from which this appeal is taken is not final within the meaning of 28 U. S. C., Section 1257. This appeal is taken as a precautionary measure.

The judgment of the Superior Court was in favor of appellant (the defendant therein) to the effect that the plaintiff City recover nothing. The judgment of the California Supreme Court reversed the judgment of the Superior Court without any direction to the Superior Court. The general rule in California is that a judgment of reversal without direction has the effect of remanding the case for a new trial and redetermination of all issues, subject only to such guidance as is to be found in the decision of the appellate court. (*Erlin v. National Union Fire Ins. Co.* (1936), 7 Cal. 2d 547, 61 P. 2d 756.)

However, in *Richfield Oil Corp. v. State Board* (1946), 329 U. S. 69, this Court held a judgment of reversal without direction by the California Supreme Court to be a final judgment under the circumstances of that case. That case had a feature in common with the instant case, namely, that it was decided on a stipulation as to the facts. That case differed substantially, however, from the instant case in that there the judgment of the Superior Court was for money, in favor of the plaintiff, on the only grounds and in the only amount available to the plaintiff. The reversal of such judgment had the inevitable effect of denying the plaintiff recovery in any amount or on any ground. The Superior Court was thus left to perform only ministerial acts, involving no judicial discretion. The judgment of the California Supreme Court was therefore final.

In the instant case, although the facts were stipulated, the reversal of the judgment for the defendant did not have the effect of granting the plaintiff any particular recovery, and the California Supreme Court did not direct any specific judgment. Instead it held that Section 21.166 of the License Ordinance was applicable to the business of appellant, imposed a rule placing a limit upon the portion of the gross receipts which could be taken into account as a base for the tax, and remanded the case to the Superior Court. It appears that the Superior Court was thus given judicial discretion to apply the rule and determine how much of appellant's gross receipts were subject to the tax. It therefore follows that the judgment of the California Supreme Court was not final. Nevertheless, it might be argued that the California Supreme Court decided that the tax should be based upon appellant's total gross receipts, with the result that no discretionary determination would be left for the Superior Court. Appellant cannot ignore the possibility that the judgment might thus be regarded as final, and therefore takes this precautionary appeal.

Appellant is in the business of producing crude oil and natural gas. All its wells are in Kern County, California (herein referred to as the field), and all its physical operations and all its sales take place there. Over ninety-three percent of its employees work there and over ninety-three percent of its expenses are incurred there. Appellant has an office at the field where all its field managing, all its engineering, and a large part of its accounting are done. Its only source of income is the substances which are produced, sold and delivered at the field. [Stip. as to Facts, pp. 2-4, 6, 8-12.]

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Appellant also has an office in the City of Los Angeles, in Los Angeles County, California, where its three highest ranking officials spend most of their working time, its board of directors meets, banking is done, and certain books and records, including general ledgers, minute books, corporate stock records and copies of some field records, are kept. Less than seven percent of its employees work there and less than seven percent of its expenses are incurred there. [Stip. as to Facts, pp. 3, 4, 7-9, 12.]

Appellant's products are sold pursuant to the provisions of long-term contracts, at market prices as they exist from time to time when the respective sales are made, not at prices existing at the time the contracts were executed. These contracts were negotiated by officers who work most of the time at the Los Angeles office, but the amount of time these officers have spent in negotiating these contracts has been less than one-half of one percent of their working time. Approximately fifteen percent of the negotiations took place in Los Angeles, approximately fifteen percent in San Francisco and approximately seventy percent by mail and other communication between the two cities. There is a ready market at the field for appellant's products, and sales effort, in the sense of salesmanship, is an exceedingly small part of its business. The long-term contracts do not constitute sales. The goods to which they refer were not in existence at the time the contracts were executed. The sales do not occur until the products are brought into existence and appropriated to the transaction. [Stip. as to Facts, pp. 4-6; Cal. Civ. Code, Secs. 1737, 1739.]

All appropriations and deliveries are made at the field by field employees of appellant pursuant to arrangements

made between such employees and employees of purchasers working in the vicinity of the field. The operations involved in appropriation and delivery consist of measuring the products, by gauging tanks in the case of liquids and by metering in the case of gas; of measuring various physical characteristics such as temperature, pressure, gravity, vapor pressure and amount of impurities contained; and of pumping the respective products to a sufficient pressure to overcome the pressure of the pipe lines into which the same are delivered (except in the case of some kinds of liquefied petroleum gas which are delivered into tank trucks). Also included in appropriation and delivery are preparation and execution of run tickets which are in effect receipts and which record all pertinent information concerning the nature, condition and quantity of products sold and delivered. Sales and deliveries are all made substantially as the respective products are produced. Approximately four percent of appellant's employees are engaged, at the field, solely in measuring and delivering products to purchasers, in addition to its employees who perform accounting functions at the field in connection with sales. [Stip. as to Facts, pp. 6, 8, 9, 12.]

The City of Los Angeles has enacted a License Ordinance which taxes certain businesses carried on in that City. [Compl. Ex. A; Stip. as to Facts, p. 2.] The City contends in this case that Section 21.166 of this License Ordinance has the effect of levying a tax on appellant measured by the total gross receipts from the sale of all its products despite the fact that they are all produced, sold and delivered in Kern County.

This action was brought by the appellee City to recover such tax. All the facts were stipulated. Upon cross motions for summary judgment the Superior Court gave

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judgment for appellant. Upon appeal by the City (appellee here) the District Court of Appeal affirmed the judgment of the Superior Court. Upon the City's motion the California Supreme Court granted a hearing and reversed the judgment of the Superior Court.

The Federal question sought to be reviewed was raised in the court of first instance by a pleading, namely, the appellant's Answer. The pertinent portion of the Answer is paragraph II of the Fourth Separate Defense contained at page 8 of the Answer and reading as follows:

> "If said License Ordinance purports to levy a tax upon defendant upon or measured by all or any gross receipts of defendant referred to in this Answer it is to that extent invalid under the Constitution of the United States, the Constitution of the State of California, the Statutes of the State of California, the common law, and the Municipal Charter of the City of Los Angeles, and each of them."

The Superior Court did not render an opinion but stated orally that it did not pass upon the constitutional question because it construed the License Ordinance as not taxing appellant under Section 21.166. It was stipulated that appellant's liability, if any, for tax under the apportionment provisions of Section 21.190 of the License Ordinance had been settled and was not in issue. [Stip. *re* License Ordinance, Sec. 21.190, pp. 1, 2.]

When the case went to the District Court of Appeal the Answer was a part of the record and the constitutional question was argued in part III of Respondent's (appellant here) Brief, at pages 36-45 thereof. (See Brief, Record herein.) The District Court of Appeal did not pass upon the constitutional question, for the same reason

that the Superior Court did not pass upon it. (See final paragraph of opinion, App. A hereto.)

When the case went to the California Supreme Court the same record and briefs were used as in the District Court of Appeal. The California Supreme Court necessarily passed upon the constitutional question (Federal as well as State) in holding, if it did hold, that the tax was to be based upon appellant's total gross receipts. (*Fiske v. Kansas* (1927), 274 U. S. 380.) In this regard the California Supreme Court said (42 Cal. 2d at 831-833):

> "Defendant company also contends that even if section 21.166 is applicable, the city cannot constitutionally tax the total gross receipts of the company since such would be an attempt to impose a tax on business carried on outside the city. This argument is based on the ground that since the total gross receipts include the proceeds of products produced and delivered outside the city the effect would be to allow a city to tax transactions occurring outside its boundaries. This argument seems to lose sight of the nature of section 21.166.
>
> "The business license tax here sought to be collected is a privilege tax, exacted for the privilege of engaging in the activity of 'selling.' When this activity takes place within the city, the rate of tax may be measured by the gross receipts derived therefrom. . . . In the case at bar it is true that some of these gross receipts are attributable to extraterritorial elements such as the production and delivery of the goods. However, there is no constitutional objection to resorting to extraterritorial elements in determining the rate of tax. (*Great Atlantic & Pac. Tea Co. v. Grosjean*, 301 U. S. 412 [57 S. Ct. 772, 81 L. Ed. 1193, 112 A. L. R. 293]; *Maxwell v. Bugbee*, 250 U. S. 525 [40 S. Ct. 2,

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63 L. Ed 1124]; *Cedar Hills Cemetery Corp. v. District of Columbia*, 124 F. 2d 286.) The activity being taxed here is the activity of selling and such activity can be taxed by the city even though the goods never enter its territorial limits. (*Keystone Metal Co. v. Pittsburgh, supra*, 97 A. 2d 797.)

"In the instant case we can find no objection, constitutional or otherwise, to the imposition of a business license tax on the privilege of engaging in selling activities within the city. Likewise there is no objection to basing the rate of such tax on the gross receipts attributable to such selling activities, even though various extraterritorial events contribute to such gross receipts. There is, however, one important limitation which should be pointed out and that is this: even though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the city of Los Angeles and as such should only be based upon such activities.

". . . To allow a city to levy a license tax based upon gross receipts attributable to selling activities outside the city would be an unreasonable discrimination and a denial of equal protection of the law. (See *Ferran v. City of Palo Alto*, 50 Cal. App. 2d 374 [122 P. 2d 965].) If such taxation were allowed it would unjustly discriminate against those firms whose selling activities in Los Angeles com-

> pose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas. . . . In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the City of Los Angeles."

It is thus clear that the California Supreme Court considered the question of the constitutionality of Section 21.166 of the License Ordinance, both as to due process and as to equal protection of the laws. (U. S. C., Const., Amend. 14, Sec. 1.) What the California Supreme Court did about the constitutional question may be a subject for argument. None of the cases cited by it would support the constitutionality of the instant tax if applied to appellant's total gross receipts.

Great Atlantic & Pac. Tea Co. v. Grosjean (1937), 301 U. S. 412, upheld a graduated rate tax on chain stores. The rate was based upon the total number of stores in the chain. Since the size of the chain affected its economic power and therefore its opportunity in Louisiana, it was a legitimate factor to be considered in fixing the rate of the tax in Louisiana.

Maxwell v. Bugbee (1919), 250 U. S. 525, upheld a graduated inheritance tax as applied to a nonresident. The tax was designed to have equal impact upon the transfer of a nonresident and a like transfer of a resident similarly situated. The fact that the case does not support the City's position in the instant case is demonstrated by this Court's citation (250 U. S. at 540) of *International Paper Co. v. Massachusetts* (1918), 246 U. S. 135. There this Court held unconstitutional, under the Fourteenth Amendment as well as the Commerce

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Clause, a state privilege tax based upon the entire authorized capital of a foreign corporation doing business in several states, although the taxing state had declared the tax "to be merely a charge for the privilege of conducting a local business therein." (246 U. S. at 142.) The Court said (246 U. S. at 142) that such a tax "is essentially and for every practical purpose a tax on the entire business of the corporation. . . ." It is the principle of the *International Paper* case which applies in the instant case, since there is no valid distinction for purposes of this case between a tax on a corporation's entire gross receipts and a tax on its entire authorized capital.

Cedar Hill Cemetery Corp. v. District of Columbia (C. A. D. C., 1941), 124 F. 2d 286, held merely that the corporation, having conducted most of its business inside the District of Columbia, was subject to a tax on the privilege of conducting business there. The corporation had stipulated that if it was subject to the tax the District assessor's computation of its liability was correct. The case did not involve the issue whether the corporation was taxable on its entire gross receipts where a portion of its business was conducted outside the District.

In *Keystone Metal Co. v. City of Pittsburgh* (1953), 374 Pa. 323, 97 A. 2d 797, the taxpayer's function was essentially that of a broker. Everything it did was done in the City of Pittsburgh.

Referring again, then, to the instant case, since the normal effect in California of a reversal without direction is to send the case back to the trial court for retrial of all issues, and since the California Supreme Court said that the tax must be restricted to receipts attributable to activities conducted within the City, but did not say

how much of the receipts it considered to be so attributable, it seems that the California Supreme Court remanded the case to the Superior Court for determination of the amount of appellant's gross receipts attributable to activities conducted within the City.

On the other hand, a holding by the California Supreme Court that all the appellant's gross receipts were attributable to activities conducted within the City would necessarily constitute a determination that Section 21.166, as applied to all such gross receipts, was valid under the due process and equal protection clauses of the Constitution of the United States. For purposes of the following discussion it will be assumed that such was the holding of the California Supreme Court, notwithstanding appellant's belief that such was not the holding.

The Question Is Substantial.

(e) The importance of defining territorial limits of taxing jurisdiction of taxing entities is too obvious to require discussion, and the question raised in the instant appeal, on the above-mentioned assumption as to the holding of the California Supreme Court, is a substantial one with respect to such limits in the case of a municipality. Here a city is paying lip service to the proposition that it cannot tax beyond its boundaries and, in the guise of taxing a subject matter within its boundaries, is measuring the tax in such a manner as in effect to tax a subject matter which is outside its boundaries. The essential objection to such a tax is that it is an attempt to charge costs of government to territory not governed. More specifically, it is an attempt to tax a subject matter which is beyond the limits of the City's control and which the

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City does not and cannot afford any opportunity, protection or benefit.

While there are several decisions of this Court dealing with and condemning indirect efforts by states to tax subject matter beyond their boundaries, there appear to be no decisions of this Court dealing with the due process and/or equal protection limitations upon such attempts by municipalities. The instant appeal presents a question within this field, an answer to which by the United States Supreme Court would be of great value both to municipalities and to taxpayers.

It cannot justly be said that the total gross receipts of appellant's business are properly referred to merely as a "measure" of selling or other activities conducted in Los Angeles, because the large activities in Kern County, which produce large gross receipts, are not in fact any measure of the small activities in Los Angeles. (*Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434.) All the sales are made outside the City and the activities incidental to selling which occur outside the City are much greater than those which occur inside the City. The California Supreme Court refers (42 Cal. 2d at 830) to the fact that payment for all sales is received in the Los Angeles office as an indication that appellant is engaged in selling activities in Los Angeles. If receipt of purchase price is a "selling activity" then certainly producing, testing, measuring and delivering, the things which actually appropriate the goods to the sale and are the essence of the sale itself, are "selling activities." (See definition of "sale" and "sell" in Sec. 21.08(s) of the License Ordinance, App. C hereto.) All these things occur in Kern County.

Even if attention were directed solely to the negotiation of appellant's long-term contracts (which would scarcely be a justifiable restriction on the scope of "selling activities") it is to be noted that only fifteen per cent of these negotiations occurred in Los Angeles. Another fifteen per cent occurred at the offices of purchasers in San Francisco and the remaining seventy per cent took place by mail, telephone and the like. [Stip. as to Facts, p. 5.]

We have found no constitutional law cases which are very close on their facts to the present case. It seems significant that the cases which are close to the present case on their facts and the language of the ordinance, such as *City of Sedalia v. Shell Petroleum Corporation* (C. C. A. 8th, 1936), 81 F. 2d 193, and *Gotlieb v. City of Birmingham* (1943), 243 Ala. 579, 11 So. 2d 363, were decided by construing the ordinance as not applying to the outside transactions.

But there are constitutional law cases which are substantially identical in principle to the instant case. A good example is *Ferran v. City of Palo Alto* (1942), 50 Cal. App. 2d 374, 122 P. 2d 965. In that case the plaintiffs were engaged in a laundry business in which the washing and ironing was done in San Francisco. They had customers in Palo Alto from whom they picked up articles to be laundered. Their business in Palo Alto was a small fraction of their total business. The City of Palo Alto enacted an ordinance which provided that anyone engaged in the laundry business or taking orders for laundering should pay a license tax based on the number of employees at the plant where the laundering was done. The city argued that the ordinance did not tax business done outside but merely provided a license fee for the privilege of

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engaging in business in the city. The court said, however (50 Cal. App. 2d at 382-383):

> ". . . Since the number of employees is in a general way proportionate to the amount of business done, and since in this case the total amount of business done is about $60,000 per annum, of which only about $900 per annum comes from within Palo Alto, it follows that the license tax is non-local and operates upon business outside of Palo Alto in proportion to the difference in amounts. It is an invalid attempt by the city to make its ordinance extraterritorial in scope and application. If the method were upheld, it would be possible to subvert the entire principle of local application of municipal revenue measures. . . ."

The case of *Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123, arose under the North Carolina Income Tax law, which provided for taxing a foreign corporation on a proportion of its entire income to be determined according to a set of rules. The rules, as applied to this taxpayer, had the effect of allocating over 80% of its total income to North Carolina, whereas in fact only about 17% was attributable to activities in that state. The Court held that this was an unconstitutional result, saying (283 U. S. at 133-134):

> ". . . But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State.

> As was said in the *Bass* case with regard to 'the unitary business of manufacturing and selling ale' which began with manufacturing in England and ended in sales in New York, that State 'was justified in attributing to New York its proportion of the profits earned by the Company from such unitary business.' And the principle that was recognized in *National Leather Co. v. Massachusetts, supra,* was that a tax could lawfully be imposed upon a foreign corporation with respect to 'the proportionate part of its total net income which is attributable to the business carried on within the State.' . . ."

It is true, of course, that the *Rees* case deals with a State rather than a city and with an income rather than a business license tax. But so far as territorial jurisdiction is concerned there is no significant difference. One hundred per cent of appellant's gross receipts are no more attributable to appellant's activities in Los Angeles than eighty per cent of *Rees'* income was attributable to activities in North Carolina. To base a Los Angeles City tax on gross receipts not attributable to activities within that City would be just as much a denial of due process as to base a North Carolina tax on income not attributable to activities within that State.

Louisville and Jeffersonville Ferry Company v. Kentucky (1903), 188 U. S. 385, was another case where an effort to tax something outside the jurisdiction was repudiated, and in which the limitations on the "merely the measure" theory were illustrated. That case involved a franchise rather than an ordinary business privilege, and the tax was technically a property tax instead of an excise tax, but that distinction is not significant. The taxpayer operated a ferry across the Ohio River between

Indiana and Kentucky under franchises from both states. Kentucky taxed the franchise granted by it as intangible personal property, but attempted to use the entire income of the taxpayer as a measure of the value of the franchise. The court said (188 U. S. at 395):

> ". . . It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise."

Another example of the repudiation by this Court of efforts to tax extraterritorially, upon facts somewhat resembling those of the instant case, is *James v. Dravo Contracting Co.* (1937), 302 U. S. 134. In that case a construction contractor fabricated materials in one state and installed them in another, payments for the work being made as it progressed. The state where the materials were installed levied a privilege tax based on gross reciepts and attempted to include payments which were for fabrication in the other state. This Court held the attempt to be invalid.

The foregoing cases place limits on the theory, which is frequently advanced in support of efforts to tax business done outside the taxing jurisdiction, that the business which is being taxed is really inside the jurisdiction and that the outside business which appears to be taxed is merely the measure of the tax on the business which is within the taxing jurisdiction. These cases show that the legitimate use of the "merely the measure" theory is limited to cases where the thing which is "merely the measure" is in fact, and not by mere declaration of the taxing authority, a measure of the business done within the taxing jurisdiction.

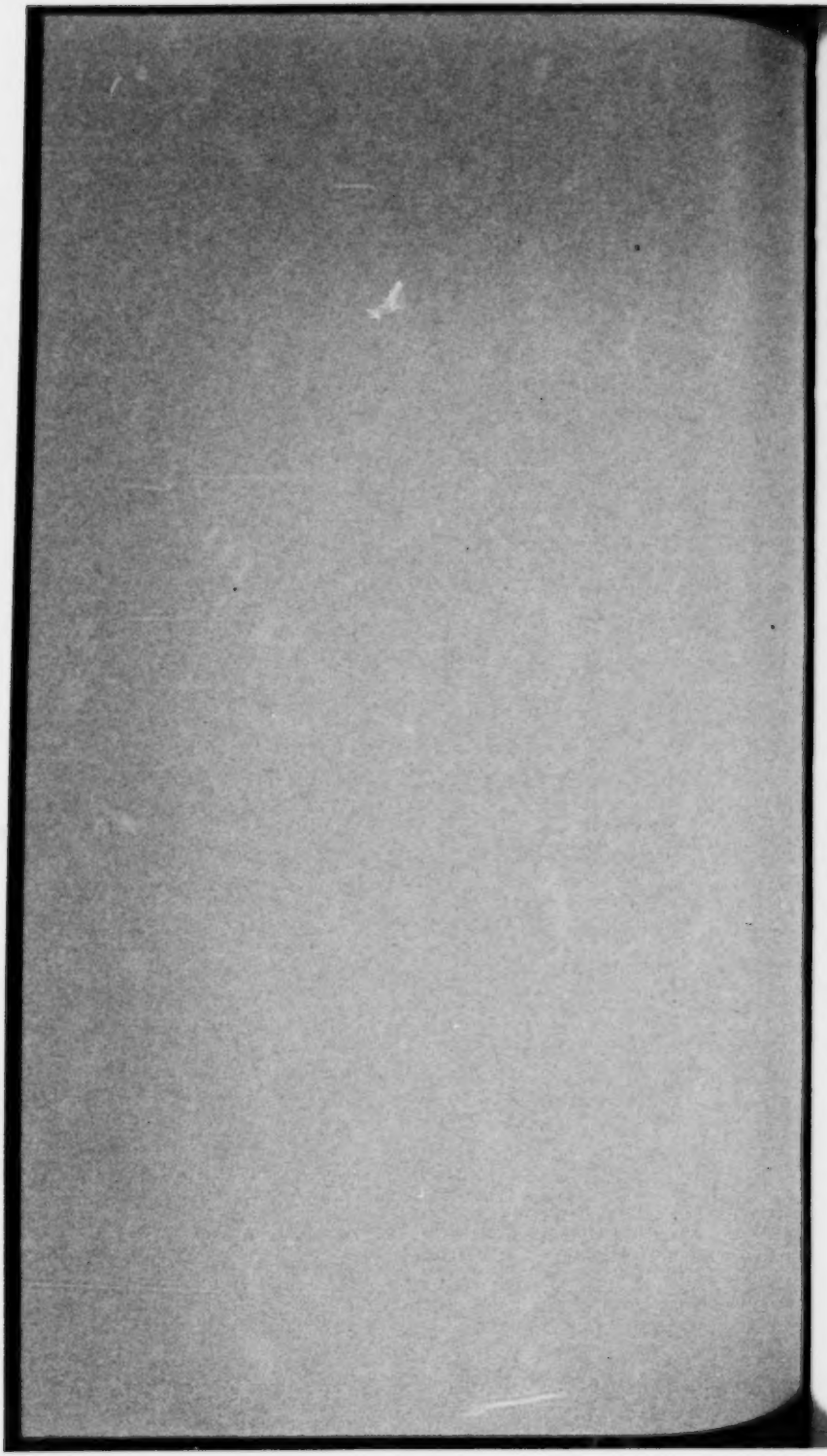
In the instant case the City says that it is taxing business carried on in Los Angeles when in reality it is attempting to tax business carried on in Kern County. To say that the proceeds of sale of products produced, sold and delivered by appellant in Kern County are the measure of business carried on in Los Angeles "sacrifices substance to form." Since the Los Angeles activities contribute only in small measure to such production and sale, the inescapable effect of the City's contention would be to collect a tax primarily out of transactions accuring outside its boundaries. (*Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434.) Appellant's situation is entirely unlike that found in *American Manufacturing Company v. City of St. Louis* (1919), 250 U. S. 459, where events occurring outside the city were in fact a measure of the business carried on in the city.

It is submitted that Section 21.166 of the License Ordinance of the City of Los Angeles, if it is applied by the California Supreme Court so as to tax appellant's total gross receipts, violates the due process and equal protection clauses of Section 1 of the Fourteenth Amendment of the Constitution of the United States. We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

VERNON BARRETT,
Counsel for Appellant,

F. C. LOWELL HEAD,
Of Counsel.



APPENDIX A.

Opinion of the California Supreme Court.

42 Cal. 2d 823.

[L. A. No. 22586. In Bank. May 26, 1954.]

City of Los Angeles, Appellant, v. Belridge Oil Company (a Corporation), Respondent.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 19431 (119 A. C. A. 637, 260 P. 2d 217), affirming judgment of the superior court. Judgment reversed.]

[825] Appeal from a judgment of the Superior Court of Los Angeles County. Roy L. Herndon, Judge. Reversed.

Action to recover license taxes. Judgment for defendant reversed.

Ray L. Chesebro and Roger Arnebergh, City Attorneys, Bourke Jones, Assistant City Attorney, and James A. Doherty, Deputy City Attorney, for Appellant.

Wellborn, Barrett & Rodi, Vernon Barrett and F. C. L. Head for Respondent.

CARTER, J.—Plaintiff appeals from a judgment in an action to recover business license taxes from the defendant. All the facts were stipulated to, and each party moved for summary judgment. The motion of defendant company was granted.

By its complaint in this action plaintiff sought a judgment in the amount of $9,768.30 as unpaid business license taxes owing for the years 1948-1950, inclusive. This claim is based on the ground that plaintiff has a right, under the provisions of section 21.166 of the Los

Angeles City Tax Ordinance, to impose a business license tax on defendant measured by the company's gross receipts. Section 21.166 provides that "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition . . ."

Defendant company is engaged in the production and sale of crude oil and natural gas. All of its wells are located in Kern County, which is the scene of all productive operations. The field office of the defendant is located in Kern County while the main office is situated in the city of Los Angeles. Its various products which are marketed under long-term contracts, are delivered to the purchasers directly at the field plants and never enter the territorial limits of the city of Los Angeles.

[826] The board of directors of defendant company meets in Los Angeles, most of the company's banking is done in Los Angeles and the corporate officers spend the major portion of their time at the main office in Los Angeles. Negotiations for the sale of defendant's products are conducted in part at the main office, in part at the offices of purchasers and in part by mail, telegraph or telephone communications between the defendant's main office in Los Angeles and the customer. Defendant company signs all contracts at its main office.

All obligations, including payrolls, are paid from the head office except emergency wage payments and disbursements for miscellaneous items, which are paid from a checking account in Bakersfield carrying an average balance of between $2,000 and $3,000. The main office

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makes all purchases, except those of an emergency nature, and payment for the sales of all items sold by defendant are received from purchasers at the main office and deposited in Los Angeles bank accounts. Based upon these facts the plaintiff city takes the position that the defendant company is engaged in selling in the city of Los Angeles the oil and gas it produces in Kern County, and that it is therefore subject to the tax provided for in section 21.166 of the Los Angeles city tax ordinance.

Defendant's theory of the case is that the company's operations are not such as to make it taxable under the provisions of section 21.166, and that even if that section is applicable, plaintiff city has no constitutional right to levy a tax under its provisions based on defendant's total gross receipts. Defendant also contends that the city's right to a recovery for the year 1948 is barred by the applicable limitation provisions of section 338(1) of the Code of Civil Procedure.

In substance the principal problem presented is one of construction—construction as to the scope and intended purview of section 21.166 of the Los Angeles tax ordinance. Plaintiff city contends that defendant company is a person selling goods, wares and merchandise at wholesale within the meaning of section 21.166. Defendant company claims that it is not.

Defendant argues that section 21.166 covers two types of businesses. Those which are engaged in the "manufacturing and selling" of goods, wares or merchandise at wholesale and those which are engaged in "selling" of goods, wares or merchandise at wholesale. This contention is based upon the ground that if "selling" by its own force includes "manufacturing and selling" there would have been no reason to separately mention "manu-

facturing and selling." In view of [827] this language, defendant argues that the term "selling" is not intended to include "manufacturing and selling" and therefore it necessarily follows that the term "selling" was not intended to include such activities as "producing and selling" or "mining and selling." Based upon this premise, defendant concludes that the inference is clear that the term "selling" is only intended to cover businesses of a merchandising nature, where selling, rather than the creation or capture of something to sell, is the essence of the enterprise; and therefore since the dominant portion of defendant's business is the capture of something to sell, section 21.166 is not applicable.

There seems to be no doubt that the defendant company was engaged in selling, since a company which derives several million dollars a year from the sale of petroleum products is obviously engaged in selling those products. However, we still have the problem of whether the defendant company was a person "selling" within the meaning of section 21.166.

In analyzing the scope and meaning of a tax ordinance of this type, we are aware that tax laws are to be construed against the municipality and in favor of the taxpayer, but it must also be remembered that such a rule does not take precedence over other fundamental rules of statutory construction. It is fundamental that "judicial construction should be in keeping with the natural and probable legislative purpose, and avoid conflict, and harmonize all the applicable provisions of the law on the subject if possible." (McQuillin, Municipal Corporations, 3d ed., vol. 16, Taxation, §44.12.) Also where the problem involves the construction of a particular section of a taxing ordinance, the ordinance should be looked to in

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its entirety and its provisions construed together. (*Bramman v. City of Alameda,* 162 Cal. 648 [124 P. 243].)

In the case at bar, the section in question (21.166) is but one small part of Ordinance No. 77,000 which is the license ordinance of the city of Los Angeles. Considering the ordinance as a whole, we find that it contains various introductory sections covering such items as definitions, interpretation, enforcement, penalties, and license transfers, followed by a great many sections setting out the tax liability of specific business enterprises such as hotels, laundrys, theaters, oil wells located in the city of Los Angeles, etc. Aside from the sections referring to specific businesses, the ordinance contains three so-called "catch-all" sections: Section 21.166 provides that "Every person manufacturing and selling any [828] goods, wares, or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay; . . ."; section 21.167 covers those who manufacture and sell or sell goods at retail and who are not licensed by other provisions; and section 21.190 provides that "Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay. . . ." While these other sections are not in issue here, a study of their provisions and of the ordinance as a whole is helpful in construing the intended scope and meaning of section 21.166.

An analysis of the ordinance in its entirety makes it apparent that even though several hundred types of businesses are specifically provided for it is almost impossible to cover each and every type of business by a specific

section. For this reason the legislative body found it expedient to include three "catch-all" sections which were intended to cover those business enterprises not specifically taxed by the other sections. Such "catch-all" provisions are not considered too vague and they have been upheld by the courts. (*City of Los Angeles v. Rancho Homes, Inc.*, 40 Cal. 2d 764 [256 P. 2d 305].)

There can be no doubt that the legislative body intended the "catch-all" sections to be sufficiently broad to cover all business enterprises not licensed under other sections of the ordinance. With this purpose in mind it is obvious that the language used in each of the three "catch-all" sections was intended to be such as would cover a wide range of activities. Our problem here is to determine whether the language of one of these "catch-all" sections, section 21.166, is sufficiently broad to include the business operations of defendant company.

Keeping in mind the broad scope and purpose of section 21.166 it becomes apparent that it was intended to cover all businesses engaged in manufacturing and selling at wholesale in the city and also those businesses which merely engaged in selling at wholesale in the city. Thus all businesses which are engaged in selling goods, wares or merchandise at wholesale in the city of Los Angeles and which are not licensed by other sections of the ordinance come within section 21.166. This is true regardless of whether they are engaged in "manufacturing and selling" or merely "selling." The important thing is that they are engaged in selling within the city of Los Angeles. If they are so engaged, all gross receipts attribu- [829] table to selling in the city of Los Angeles are subject to the business license tax provided for by section 21.166. The fact that the goods sold are produced in

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remote areas is unimportant. It is also immaterial whether they are produced in a company owned plant or purchased from an independent producer. The important thing is that the taxpayer is engaged in selling goods at wholesale in the city of Los Angeles.

Section 21.166 of the tax ordinance was meant to cover those businesses, not covered by other sections, which are engaged in selling goods at wholesale in the city. It is so worded to include those who manufacture and sell as well as those who merely sell in the city. The fact that an organization is engaged in selling in the city is sufficient and it is of no import that selling is but a small part of the total effort or that selling is not difficult for the instant company. There is no reason to believe that the authors of section 21.166 were concerned with the degree of effort or expense involved in the selling of goods nor were they concerned with whether or not selling was the dominant or incidental activity of the company. The main concern would appear to be whether or not the company was engaged in the selling of goods. The purpose of the section was to place a business license tax on those activities which took place within the city of Los Angeles regardless of their relationship to activities outside the city.

The defendant company has argued that the term "selling" was not intended to include other elements such as "producing and selling" or "mining and selling," but rather that it could only mean selling of a merchandising nature. Such argument seeks to narrow the meaning of the words used to the point of actually destroying the general purpose of a "catch-all" section. The sale of goods is defined in section 1721(2) of our Civil Code as "an agreement whereby the seller transfers the property

in goods to the buyer for a consideration called the price." There is no requirement that the seller must be in the merchandising business before the transaction can be called a sale and likewise it is not logical to attempt to narrow the meaning of the term "selling" to include only those whose dominant business is of a merchandising nature.

There is nothing in section 21.166 or anywhere in the entire taxing ordinance indicating that the word "selling" was only meant to include businesses where selling was the dominant part of a taxpayer's business. On the contrary section 21.08(t) of the Los Angeles tax ordinance provides that "The phrase [830] 'selling goods, wares and merchandise' shall, in addition to any other meaning established at law, be deemed to extend to and include in its application persons who engage in the business of fabricating, serving or supplying, for a price, tangible personal property furnished, produced or made at the special order of purchasers or consumers, or for purchasers or consumers who do or do not furnish, directly or indirectly, the specifications therefor." Thus the business of "selling" includes not only those businesses where merchandising is the dominant element but also those businesses which are engaged in "fabricating, serving or supplying" goods for a price.

In the case at bar defendant company, being a corporation, is a person as defined in section 21.08(p) of the Los Angeles tax ordinance. The petroleum products with which it deals are considered in the nature of merchandise (*West v. Kansas Natural Gas Co.*, 221 U. S. 229 [31 S. Ct. 564, 55 L. Ed. 716]) and the gross receipts of defendant company are derived from the sale of such merchandise. Most negotiations for these sales were con-

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ducted through the defendant's Los Angeles office and all the contracts were signed by defendant in Los Angeles. Also payment for all sales is received from purchasers at the Los Angeles office. These factors along with the other stipulated facts make it apparent that defendant's Los Angeles office was engaged in the activity of "selling goods, wares or merchandise at wholesale" within the city of Los Angeles and was therefore subject to the provisions of section 21.166 of the Los Angeles tax ordinance.

The mere fact that the products sold never entered the city of Los Angeles does not prevent the selling activities from taking place in Los Angeles. (*McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33 [60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876].) The business license tax in question here, is based on the fact that the selling activity is carried on within the city and it is immaterial where the products are produced or delivered. In the 1953 case of *Keystone Metal Co. v. Pittsburgh*, 374 Pa. 323 [97 A. 2d 797], the sales transaction was consummated in Pittsburgh but the goods were shipped from a point outside Pennsylvania to a plant in New Jersey. The Supreme Court of Pennsylvania held that the receipts of such sale should be included in the measure of the city of Pittsburgh's license tax, based on gross receipts. The court held that the selling activities within the city were sufficient to sustain imposition of the tax even though delivery and passage of title took place outside the city.

[831] Defendant company also contends that even if section 21.166 is applicable, the city cannot constitutionally tax the total gross receipts of the company since such would be an attempt to impose a tax on business carried on outside the city. This argument is based on the ground

that since the total gross receipts include the proceeds of products produced and delivered outside the city the effect would be to allow a city to tax transactions occurring outside its boundaries. This argument seems to lose sight of the nature of section 21.166.

The business license tax here sought to be collected is a privilege tax, exacted for the privilege of engaging in the activity of "selling." When this activity takes place within the city, the rate of tax may be measured by the gross receipts derived therefrom. (*Union Pac. R. R. Co. v. City of Los Angeles*, 53 Cal. App. 2d 825, 830 [128 P. 2d 408].) As stated by this court in *Martin Ship Service Co. v. City of Los Angeles*, 34 Cal. 2d 793, 796 [215 P. 2d 24], "In view of the recent decisions of the United States Supreme Court in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 [68 S. Ct. 1475, 92 L. Ed. 1832], and *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653 [68 S. Ct. 1260, 92 L. Ed. 1633], the city may clearly tax plaintiffs' local activities and the gross receipts therefrom." In the case at bar it is true that some of these gross receipts are attributable to extraterritorial elements such as the production and delivery of the goods. However, there is no constitutional objection to resorting to extraterritorial elements in determining the rate of tax. (*Great Atlantic & Pac. Tea Co. v. Grosjean*, 301 U. S. 412 [57 S. Ct. 772, 81 L. Ed. 1193, 112 A. L. R. 293]; *Maxwell v. Bugbee*, 250 U. S. 525 [40 S. Ct. 2, 63 L. Ed. 1124]; *Cedar Hills Cemetery Corp. v. District of Columbia*, 124 F. 2d 286.) The activity being taxed here is the activity of selling and such activity can be taxed by the city even though the goods never enter its territorial limits. (*Keystone Metal Co. v. Pittsburgh, supra*, 97 A. 2d 797.)

In the instant case we can find no objection, constitutional or otherwise, to the imposition of a business license tax on the privilege of engaging in selling activities within the city. Likewise there is no objection to basing the rate of such tax on the gross receipts attributable to such selling activities, even though various extraterritorial events contribute to such gross receipts. There is, however, one important limitation which should be pointed out and that is this: even though the city can tax the activity of selling it can only [832] base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the city of Los Angeles and as such should only be based upon such activities.

In the case of *Gotlieb v. City of Birmingham,* 243 Ala. 579 [11 So. 2d 363], the city ordinance imposed a tax on "each packing house" and on persons "soliciting or selling packing house products." In construing the scope of this city ordinance the court held that in computing the license tax, based upon gross receipts, sales outside the territorial limits of the city should not be included. In *City of Sedalia v. Shell Petroleum Corp.* (C. C. A. 8th, 1936), 81 F. 2d 193 [106 A. L. R. 1327], a city license tax on persons engaged in the business of selling gasoline, based on the number of gallons sold, was held to be inapplicable to sales made outside the city. The court at page 196 stated that "there is a presumption that

the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city, and there is nothing in the provision of the ordinances indicating that it was the intention to give them extraterritorial effect." To allow a city to levy a license tax based upon gross receipts attributable to selling activities outside the city would be an unreasonable discrimination and a denial of equal protection of the law. (See *Ferran v. City of Palo Alto,* 50 Cal. App. 2d 374 [122 P. 2d 965].) If such taxation were allowed it would unjustly discriminate against those firms whose selling activities in Los Angeles compose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas. As stated in *Franklin v. Peterson,* 87 Cal. App. 2d 727, 730 [197 P. 2d 788], "It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the Constitu- [833] tion, but to make a valid statute or ordinance within the scope of its constitutional powers." In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the city of Los Angeles.

It is also contended, by defendant company, that the plaintiff city's cause of action for the recovery of 1948

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taxes is barred by subdivision 1 of section 338 of the Code of Civil Procedure. Defendant had previously taken the position, in the trial court, that the two-year limitation of section 339-1 (Code Civ. Proc.) might also be applicable but in their appeal this view has been abandoned. Plaintiff argues that the four-year period of section 343 is applicable, and it therefore becomes necessary to determine whether the limitation period on the city's cause of action for taxes is governed by the provisions of section 338-1 or by the provisions of section 343.

Section 343 of the Code of Civil Procedure provides that "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." In view of this wording section 343 can only apply if no limitation period for the instant action is provided for in the previous sections. Defendant company contends that the instant cause of action by the city for taxes comes within the limitation period of previous section 338-1 and therefore section 343 cannot apply. We are inclined to agree.

The three-year limitation period of section 338-1 which is applicable to "an action upon a liability created by statute, other than a penalty or forfeiture," adequately covers the instant cause.

It is true that section 338-1 purports to cover only those liabilities created by statute, but in *King Mfg. Co. v. Augusta*, 277 U. S. 100 [48 S. Ct. 489, 72 L. Ed. 801], the Supreme Court of the United States construed the word statute as including municipal ordinances. Thus by the direct approach of construction it would be possible to say that the instant license tax was a liability created by statute. It is also possible to reach the same result by the indirect method since we find that a liability created

by statute is a liability which would not exist but for a statute. (*Fidelity & Deposit Co. of Maryland v. Lindholm* (C. C. A. 9th, 1933), 66 F. 2d 56, 58 [89 A. L. R. 279].) In the instant case the city license tax, though [834] created in the final instance by the license ordinance could not have existed but for the power delegated to the city by the state Constitution and statutes. This is true since "[m]unicipal corporations have no inherent power of taxation. On the contrary, they possess with respect thereto only such power as has been granted to them by the constitution or statute. (McQuillin, Municipal Corporations, 3rd Ed., Vol. 16, §44.05.) In *Wright v. City of Lorain,* 70 Ohio App. 337 [46 N. E. 2d 325], it was held that the liability of a city to pay a policeman's salary, which was provided for by city ordinance as authorized by state statutes, was a liability created by statute. Reasoning from this basis the Ohio court held that the action for the recovery of such salary was barred by the provisions of the limitation statute dealing with liabilities created by statute. Regardless of whether we prefer this indirect approach or the direct approach of construing the word statute to include ordinance, the inevitable conclusion is that the liability in question was created by statute and therefore the limitation period of section 338-1 is applicable.

In the case at bar the three-year period of limitation of section 338-1 which is applicable, runs from the time the cause of action accrues, and the cause of action accrues when the tax becomes delinquent. Since the tax due under section 21.166 must be paid before the close of business on the last day of February of each year (sections 21.20 and 21.24.1 of the Los Angeles Tax Ordinance), the tax for the year 1948 was delinquent on

March 1, 1948. The three-year limitation period which began to run from this date expired on March 1, 1951, which was prior to the filing of the complaint by plaintiff city, and, therefore, the city's cause of action for recovery of the 1948 tax is barred.

We hold, therefore, that the defendant company is subject to the business license tax under the provisions of section 21.166 of the Los Angeles tax ordinance as here construed but that the city's cause of action to recover such tax for the year 1948 is barred.

Judgment reversed.

Shenk, J., Edmonds, J., Traynor, J., Spence, J., and Bray, J., pro tem., concurred.

SCHAUER, J.—I dissent. It is my view that the opinion prepared for the District Court of Appeal (reported at (Cal. [835] App.) 260 P. 2d 217), authored by Justice Fox and concurred in by Presiding Justice Moore and Justice McComb, adequately discusses and correctly resolves the issues which are presented on this appeal. For the reasons therein stated, I would affirm the judgment.

Opinion of the District Court of Appeal.

[Civ. No. 19431. Second Dist., Div. Two. Aug. 5, 1953.]

City of Los Angeles, Appellant, v. Belridge Oil Company (a Corporation), Respondent.

Appeal from a judgment of the Superior Court of Los Angeles County. Roy L. Herndon, Judge. Affirmed.

Action to recover license taxes. Judgment for defendant affirmed.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, and James A. Doherty, Deputy City Attorney, for Appellant.

Wellborn, Barrett & Rodi, Vernon Barrett and F. C. L. Head for Respondent.

Fox, J.—Plaintiff appeals from a judgment in an action to recover license taxes from defendant. The cause was decided upon stipulated facts, both parties moving for summary judgment. The motion of defendant company was granted.

Plaintiff's complaint, incorporating the complete license ordinance of the city of Los Angeles, prayed judgment in the amount of $9,768.30 as unpaid business license taxes owing for the years 1948-1950, inclusive. Plaintiff's claim is based on its asserted right to impose a business license tax on defendant measured by the gross receipts of the company during those years as a person engaged within the city in "selling goods, wares or merchandise at wholesale" as defined in section 21.166, Los Angeles City Li-

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cense Tax Ordinance.* Neither the amount of the gross receipts nor the computation of the amount of the tax is here in issue. The character of defendant's business activity, stipulated to by the parties and made a part of the complaint, will be more comprehensively set forth below. Defendant's answer, relying upon the stipulations relating to the nature of its operations, denies that it comes within the intended purview of section 21.166 for reasons which will subsequently be more fully discussed. As separate defenses, the answer also alleges that the city's right to a recovery for the years 1948 and 1949, or, alternately, for the year 1948 alone, is barred by the applicable limitations provisions of sections 339(1) and 338(1) of the Code of Civil Procedure. By way of a fourth separate defense, defendant challenges the plaintiff's constitutional right to levy the claimed tax on defendant. The trial court granted defendant's motion for a summary judgment dismissing the action.

The stipulation as to facts presents a detailed survey of the over-all conduct of defendant's operations, and from it we extract only so much as is requisite to the adjudication of the issues presented. Defendant is engaged in the production of crude oil and natural gas, all of its wells

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*Section 21.166 reads in part:

"Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition thereto, the sum of 40c per year for each additional $1,000 of gross receipts, or fractional part thereof, in excess of $20,000; . . ."

being located in Kern County (designated herein as "the field"), which is the site of its field offices and the scene of all its physical operations. Defendant's head office is situated in the city of Los Angeles. Its various products are marketed under long-term contracts of sale at prices prevailing at the time the sales contracts are executed. The products covered by these contracts are segregated and delivered to the purchasers directly at the field plants and never enter the territorial limits of the city of Los Angeles while title remains in defendant. It is the city's contention that by the operation of section 21.166 of the licensing ordinance, it may levy a tax on defendant measured by the gross receipts derived from the sale of all its products produced and delivered in Kern County.

In support of its position, plaintiff focuses its attention on the phases of defendant's activities governed by its head office in the city of Los Angeles, where defendant carries on important managerial and administrative functions. Most of the working time of defendant's high-level officers—its president, two vice presidents (one of whom performs the duties of secretary), treasurer, four assistant secretaries, an assistant treasurer, purchasing agent and controller—is spent there. The board of directors of defendant company meets in Los Angeles, which is where management policies are generally formulated, though policy decisions may also be made in the field by conferences between the field manager and authorized company officers. The company's banking is done in Los Angeles. Belridge's president and treasurer spend all their time at the head office, while the vice presidents, purchasing agent, and controller spend between 60 and 90 per cent of their time there, the rest being devoted to work in the field. The equivalent of 16 full-time em-

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ployees, constituting about 7 per cent of the personnel, spend virtually all their working time at the head office, where approximately 7 per cent of the company's expenses are incurred. Defendant's sales contracts are negotiated by the officers who work most of the time at the Los Angeles office, but the amount of time consumed in actual negotiations in the years 1947-1950 amounted to less than one-half of one per cent of their total working time. Approximately 15 per cent of the time required for conducting negotiations leading to sales was consumed in Los Angeles, and an equal amount at the office of purchasers in San Francisco; the balance was handled by mail, telephone and telegraph communications between defendant's Los Angeles office and the purchasers' offices in San Francisco. Defendant signed the contracts at its head office. There is a readily available market in the field for Belridge's products and sales promotion occupied only a small part of defendant's business activities.

The head office is responsible for an extensive amount of clerical work and record keeping. Among the books and records kept there are the corporate stock records, the general and property ledger, cash and journal records, income tax, insurance and purchasing records, correspondence files, contracts, production summaries, and copies of various records, all prepared by the field office. Monthly billings to purchasers and payroll reports to federal and state agencies emanate from the head office. Defendant's obligations are all paid from the head office except emergency wage payments and disbursements for miscellaneous items, which are paid from a checking account in Bakersfield carrying an average balance of between $2,000 and $3,000. Other payroll checks for all field employees are written and signed at the head office and mailed to the

field office for distribution, but the payrolls for such employees are prepared in the field office where all pertinent payroll data is kept, and which supplies the home office with the information for the individual pay-checks it prepares. The head office makes all purchases, except those of an emergency nature, but these purchases are based on requisitions presented by the field office. All policy questions in connection with expenditures for normal operating purchases are determined at the field office, and though they may be very large in amount, are customarily paid by the head office as a matter of routine without special approval. Payment for the sales of all items sold by defendant are received from purchasers at the head office and deposited in Los Angeles bank accounts.

The cost of operating the head office has ranged from $161,000 to $242,000 during the years in question.

All of defendant's manifold activities incident to the operation of its oil field is concentrated within the borders of Kern County. In its extensive physical operations, it has employed, in the period here under consideration, a staff of between 191 and 250 workers, and its operating costs in the field have varied from $2,473,466 for the year 1947 to $3,111,321 in 1950. Its field operations are concerned with the problems of where and how to drill wells in order to achieve maximum production efficiency; the actual drilling and daily operation of the wells; the gathering of crude oil and natural gas there produced and the extraction of natural gasoline and liquefied petroleum gas; the delivery of the above substance to purchasers; the installation and maintenance of plant equipment and facilities and the making of all original accounting records related to the functions described. Two field warehouses are maintained containing an inventory

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of materials worth between $500,000 and $1,000,000. Records relating to the quantity and prices and receipt and disbursement of all items of the inventory are kept in the field, and inventories of this property are sent monthly and annually to the head office.

The field office is directed by a resident field manager, who is subject to orders only from the president and vice presidents. These orders are generally given him verbally by a vice president at the field but are sometimes communicated by letter or telephone from the head office. The field manager sometimes participates in formation of policy, but in this regard he ranks below the president and vice presidents.

The field engineering office keeps detailed records of the drilling reports of each well and of the production, repairs and all operations performed in connection with each individual well, of which it sends copies to the head office. A separate report is made to the head office of all labor, equipment and material used in the various operations for which the field office is accountable. Such records and reports, which are necessary for the billing of the purchasers of petroleum products, are sent to the head office.

All field employees are hired at the field office, where employment applications are filed and a copy sent to the head office. The field office keeps a record of each worker's employment history, and furnishes a labor distribution sheet on each employee to the head office covering the hours worked each day on each job, pay rate, and other matters. The union contract is negotiated, prepared and signed in the field by the company's two vice presidents without any action thereon emanating from the head office except that the outcome is reported to the board of di-

rectors. The field office issues group insurance cards to its employees and processes claims thereunder for payment at the head office. The intricate and complicated problem of the assessment of Belridge's mineral rights is the responsibility of the field office, and is handled by a petroleum engineer stationed in the field who represents the company in discussions with Kern County taxation officials.

Defendant paid a license tax for the years 1948 and 1949 in the amount of $12 for each year, the minimum sum required under section 21.190 of the license ordinance, after discussion with and at the request of representatives of the city clerk of Los Angeles. On January 4, 1950, defendant again paid the sum of $12, but an objection to such amount was made on January 24, 1950, whereupon defendant paid an additional sum of $161 under section 21.190, measuring the tax by the gross cost of maintaining the head office (see §21.190(d)). It was not until the latter part of March, 1950, that plaintiff first indicated to defendant that its license tax payments should be based on its gross receipts.

Defendant's liability under section 21.190 is not here in issue, the question being defendant's liability, if any, under section 21.166 of the license ordinance. The city contends that the judgment is erroneous on the theory that defendant company is a person engaged in selling goods, wares and merchandise at wholesale within the meaning of section 21.166, which imposes on such persons a tax measured by the gross receipts derived from

such sales. This contention, in our opinion, cannot be sustained.

Our consideration is therefore addressed to the question of whether the language used in the ordinance under which a business license tax is claimed from defendant purports to describe and cover the particular business in which it is engaged. From a study of the phraseology and an analysis of the import of section 21.166, it is evident that defendant's business operations in Los Angeles were not intended to be included in the businesses mentioned as subject to the license tax imposed therein. This conclusion is fortified by an examination of the structure and purposes of the Los Angeles Business License Tax Ordinance as disclosed by its underlying policy.

Section 21.166 is one of three "catch-all" provisions found near the very end of the ordinance, which contains over 150 separate sections and subsections descriptive of specific kinds of businesses upon which is imposed a prescribed tax. In some sections the word "business" or a term of analogous significance is used, but other sections dealing with particular occupations omit reference to the word "business" or any equivalent term. Section 21.49, one of the general provisions of the ordinance which precedes the lengthy enumeration of the various categories of business within its purview, provides in part as follows: ". . . a license is required to be obtained by every person engaged in any of the businesses, trades, callings or professions specified in the following sections of this Article; . . ." From the catalogue of detailed

and distinct varieties of businesses which next follow, it is plain that the purpose of the ordinance is to levy a tax upon the privilege of carrying on a designated occupation or business. (*Martin Ship Service Co. v. City of Los Angeles*, 34 Cal. 2d 793, 794 [215 P. 2d 24].)

"The term 'business' as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means *a business in the trade or commercial sense*, one carried on with a view to profit or livelihood." (*Cuzner v. California Club*, 155 Cal. 303, 311 [100 P. 868, 20 A. L. R. N. S. 1095].) (Italics added.) Among the listed occupations is the business of producing oil, which is covered by section 21.124, and reads in part as follows: "For every person producing oil from any well located in the City of Los Angeles, the sum of $2.00 per quarter for each such well producing four hundred (400) barrels or less of oil per quarter, plus ½ cent per barrel oil produced by each such well in excess of four hundred (400) barrels per quarter. . . ." This section, of course, patently applies to the type of business in which defendant is engaged. (*Union Pac. R. R. Co. v. City of Los Angeles*, 53 Cal. App. 2d 825, 830 [128 P. 2d 408].) However, it is here concededly inapplicable since by its explicit terms it operates only within the territorial limits of the municipality.

Following the exhaustive enumeration of occupations found in the license ordinance come the three catch-all sections. Section 21.167 requires every person selling goods, wares and merchandise at retail, and who is not specifically licensed, to pay a tax measured by gross receipts at the rate of 50 cents per $1,000. Section 21.190, under which defendant has until the commencement of this action paid its license tax, requires every person engaged

in any trade, calling, profession, occupation, vocation or other means of livelihood not otherwise specifically licensed, to pay a tax measured by gross receipts at the rate of $1.00 per $1,000.*

The pertinent language of section 21.166, the catch-all provision here involved, reads as follows: "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay . . ." Since defendant's production of oil takes place outside Los Angeles, plaintiff makes no claim that Belridge is a person "manufacturing and selling" within the language of section 21.116. It is plaintiff's position that, by the use of the term "selling goods, wares and merchandise," it was the intention of the framers of section 21.166 to include within its scope the business in which defendant is engaged. We are unable to agree that this is a fair,

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*Section 21.190, subdivision (d) provides for an allocation of income and reads in part as follows:

"When the gross receipts are derived from or attributable to sources both within and without the city, the license tax imposed by this section shall be measured by the gross receipts derived from or attributable to sources within this city. Such gross receipts shall be determined by an allocation upon the basis of pay roll, value and situs of tangible property, general expenses, or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine the gross receipts derived from or attributable to sources within this city. Gross receipts attributable to isolated or occasional transactions at places outside the city but within the State of California, where the licensee is not engaged in business shall be considered as gross receipts derived from or attributable to sources within this city. Gross receipts derived from or attributable to sources within this city include (a) gross receipts from tangible or intangible property located or having situs in this city and (b), when not contrary to law, gross receipts from any activities carried on in this city regardless of whether carried on in interstate, intrastate or foreign commerce. . . ."

reasonable, or contemplated application of the language employed.

The language of section 21.166 is couched in the alternative and plainly discloses that its authors had two categories of business in mind. In the first instance, it refers to persons "*manufacturing and selling* any goods, wares, or merchandise at wholesale"; this is conjoined by a statement referring to persons "*selling* goods, wares or merchandise at wholesale." (Italics added.) The tax under the ordinance being an excise tax on the privilege of engaging in a particular kind of business (see *McAdams Oil Co. v. Los Angeles*, 32 Cal. App. 2d 359, 364 [89 P. 2d 729]), it is clearly manifest that it was intended to reach both those engaged in a pursuit primarily of a creative nature who sell the product of their manufacture, as well as those engaged in callings of which selling alone is the essence. It is a matter for judicial cognizance that in the commercial world, there is a marked distinction between a business of a manufacturing or productive nature and one in which selling, trading or dealing is the fundamental feature. (*Kansas City v. Butt*, 88 Mo. App. 237; *Chattanooga Plow Co. v. Hays*, 125 Tenn. 148 [140 S. W. 1068, 1069-1070].) As defendant points out, it is to be inferred that the words "manufacturing and" were intended to have some meaning. If the word "selling" of its own force were designed to embrace "manufacturing and selling," there would have been no reason to particularly mention "manufacturing and selling." It follows from a logical interpretation of the two terms chosen that "selling" as here employed was not intended to include businesses where an activity like manufacturing was the dominant nature of the enterprise and selling merely the function or medium by which its output is

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metamorphosed into realizable gain. (See *Chattanooga Plow Co. v. Hays, supra.*) The reasonableness of such a distinction was pointed out in the case of *Davis v. Mayor & Council of Macon,* 64 Ga. 128 [37 Am. Rep. 60], where the court had under consideration the validity of a license tax ordinance exempting a farmer selling his own meat product from an occupation tax levied upon the selling of butcher's meat. It was there said: "The producer whose trade is incident to production, and the middleman whose trade is intermediary between the producer and the consumer, belong not to the same class but to different classes of subjects in a scheme of taxation. At least the difference is wide enough to justify, if not to compel, its recognition in shaping the scheme." And in an analogous connection, it was stated in *American Sugar Refining Co. v. Louisiana,* 179 U. S. 89 [21 S. Ct. 43, 45 L. Ed. 102]: "But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation but to exempt producers from the taxation of the *methods employed by them to put their products upon the market.*" (Italics added.) By spelling out this dichotomy, the framers of the ordinance wished to make certain that on the one hand manufacturer who necessarily sell would not be able to evade the effect of the statute on the grounds that selling is only an incidental aspect of their business. On the other hand, in using the term "selling," it is practical and reasonable to infer that the ordinance endeavors to take in all other business classifications of a merchandising or mercantile nature (those heterogeneous and diversified businesses which variously go under generic classifications such as merchant, trader, dealer, wholesaler, jobber, distributor, etc.) in which selling *per se,* rather than the manufacture,

creation or production of goods, is the essential character of the business operation.

Since defendant's production of oil takes place outside Los Angeles, plaintiff makes no claim that it is a person "manufacturing and selling," the language of section 21.166 most descriptive of defendant's business. Plaintiff urges, however, that defendant is engaged in "selling activities" within the city, and maintains that even though the greater part of Belridge's efforts are expended in the production of something to sell and a much lesser part in its so-called "selling activities," it must be considered as "selling goods, wares and merchandise" within the meaning of the ordinance. However, this disregards the fact that an examination of the context and general structure of the license ordinance discloses that the concept of "business" or "occupation" as distinquished from an ancillary activity, inheres throughout. Also it overlooks the significance of the words "manufacturing and selling" which are contained in section 21.166. While Belridge admittedly is engaged in "selling" in the sense that it markets the product it produces, that is not the dominant nature of its business; hence it cannot properly be characterized as a person "selling" in the sense the expression is used in section 21.166. It may be observed that Robert Louis Stevenson once wrote, in a synical epigram: "Everyone lives by selling something." But, as has been previously pointed out, it is the occupation of selling, as a recognized and identifiable mercantile business, and not "selling activities" which are merely an incidental though important part of an integrated business such as manufacturing, to which the phrase "selling goods, wares and merchandise" applies in this context. (See *In re Holmes,* 187 Cal. 640, 644-645 [203 P. 398].)

Of some pertinency to this point is the *ratio decidendi* in the case of *San Francisco v. Larsen,* 165 Cal. 179, 181 [131 P. 366], where a restaurateur sought to come within the license-tax exemption offered a person "who at any fixed place of business . . . sells or manufactures goods, wares, or merchandise." In discussing whether a restaurant keeper is either a seller or manufacturer of goods, the court stated: "It cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum with the charge for service and use of dishes, chair, and table. It is nevertheless a sale of the food consumed, within the technical definition of that term.

"But this single point of coincidence does not necessarily bring the restaurant keeper within the class described in the exempting clause. We are not dealing solely with the question whether or not he does, in his business, technically sell goods, but with the question whether or not, within the meaning of the provision prohibiting license-taxes upon described places of business, he is a person who 'sells or manufactures goods, wares or merchandise.' We must look to the phrase as a whole, consider its object and purpose and give it a meaning according to the ordinary acceptation of the words used. When we speak of a place where the business of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection. One who mixes and cooks foodstuffs is engaged in the business of manufacturing goods, if we use the words according to their literal meaning, but if we mention manufacturers we should scarcely expect to be under-

stood to refer to the keeper of restaurants. A restaurant keeper is not, according to ordinary usage, either a merchant or a manufacturer." So here we are convinced that when the term "selling" was used in the alternative and in contradistinction to "manufacturing and selling," the framers of the law were imposing a tax upon the privilege of carrying on a business distinct from one of a manufacturing nature, and of which selling was the paramount attribute. It was not intended to be a privilege tax on "selling activities" related to a manufacturing or producing business. The sale of the products of manufacture is an indispensable aspect of the business of manufacturing; the power to manufacture implies the power to sell what is produced. (*Commonwealth v. Thackkra Mfg. Co.*, 156 Pa. 510 [27 A. 13].) It was not the legislative intent to tax a business which in common parlance is universally spoken of as a manufacturing or production business under a designation not appropriate to it, nor is this justified by a rational view of the statutory language.

Plaintiff argues that the definition of the phrase "selling goods, wares, and merchandise" contained in section 21.08(t) expands the limits of its commonly accepted understanding to cover defendant's operations. This section provides (with italics added to stress the provisions plaintiff contends are here specially applicable):

"The phrase 'selling goods, wares and merchandise' shall, in addition to *any other meaning established at law*, be deemed to extend to and include in its application *persons who engage in the business of* fabricating, serving or *supplying for a price, tangible personal property furnished, produced* or made at the special order of purchasers or consumers, or *for purchasers or consumers who do or who*

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do not furnish, directly or indirectly, the specifications therefor." While this plainly evinces an intent to enlarge the ordinary comprehension of the phrase, it is far from disclosing any purpose to depart from all established meanings and traditional understandings of the expression. Rather, it reinforces our position that the ordinance recognizes the line of demarcation between *businesses* of a manufacturing and of a selling nature, but is here endeavoring to encompass certain peripheral or hybrid enterprises which do not too clearly lend themselves to characterization in the one sphere or the other. Thus the most cogent interpretation of the somewhat intricate language of the section appears to be that it was basically designed, as respondent suggests, to embrace such occupations as custom fabicators, restaurateurs and the like, which are in a borderland area of occupational classification so far as a catch-all provision covering the business of "selling" is concerned. This is clearly emphasized by the definition of "sale" and "sell" contained in the preceding section 21.08(s).* The addition in section 2108(t) of the words "for purchasers or consumers who do or who do not furnish, directly or indirectly, the specifications therefor," when construed in connection with the words they immediately follow ("at the special order of pur-

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*Section 21.08(s) reads: "The words 'sale' and 'sell' shall be deemed to include and refer to: the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall likewise be deemed a sale. The foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law."

chasers or consumers") suggest no more than an intent to negate any intimation that custom purchasers or consumers would lose such status by omitting the furnishing of specifications for the merchandise. We cannot perceive that the circumscribed and guarded language of this clause was meant to apply to Belridge's business. Any such intention could have been expressed in more forthright and unequivocal language.

In further support of its thesis that defendant is engaged in "selling," or activities which are part of a selling business, plaintiff cites *Natural Gas Co. of Virginia v. Commonwealth,* 186 Va. 921 [45 S. E. 2d 177]. That case presents no analogy to the case at bar. The question there presented was whether plaintiff, who was the local agent of a foreign corporation, came within the purview of a statute imposing a tax on "commission merchants," defined as "Every person . . . buying or selling for another any kind of merchandise on commission, . . ." Plaintiff advertised the product, solicited orders, made delivery from its own warehouse and remitted the proceeds, less commissions, to the foreign corporation. Plaintiff argued that it was a "broker" rather than a "commission merchant." The court found that plaintiff's activities in behalf of its foreign principal constituted selling for which it received a commission, thus bringing it within the statutory definition of that term, "commission merchant." But as the court points out, plaintiff's promotion, negotiation and completion of sales for its principal (its selling activities) constituted the "heart and soul of the contract" between the parties—or, in other words, the essence of its business.

While we think the legislative intent clear, it is well recognized that where substantial doubt exists as to whether or not a particular business is included within the descriptive or designating language of an ordinance imposing a license tax, that doubt must be resolved in favor of the taxpayer. (53 C. J. S., Licenses, p. 495; 33 Am. Jur., Licenses, p. 329.) "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]" (*Pioneer Express Co. v. Riley*, 208 Cal. 677, 687 [284 P. 663].)

In view of the foregoing conclusion it becomes unnecessary to consider other issues raised by counsel.

The judgment is affirmed.

Moore, P. J., and McComb, J., concurred.

APPENDIX B.

Constitution of California.

Article XI, Section 6. (Cal. Stats. 1951, p. lvi): . . . Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. * * *

Article XI, Section 8. (Cal Stats. 151, pp. lxii, lxv):

(a) Any city or city and county containing a population of more than three thousand five hundred inhabitants, as ascertained by the last preceding census taken under the authority of the Congress of the United States or of the Legislature of California, may frame a charter for its own government, consistent with and subject to this Constitution; and any city or city and county having adopted a charter may adopt a new one. * * *

* * * * * * * * *

(j) In submitting any such charter or amendment separate propositions, whether alternative or conflicting, or one included within the other, may be submitted at the same time to be voted on by the electors separately, and,

as between those so related, if more than one receive a majority of the votes, the proposition receiving the largest number of votes shall control as to all matters in conflict. It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. * * *

APPENDIX C.

License Ordinance of the City of Los Angeles.

Ordinance No. 77000

Chapter 2

LICENSES, PERMITS, BUSINESS REGULATIONS.

Article 1—License Taxes—Sales Tax and Use Tax

Sec. 21.08. Definitions.

The following words and phrases whenever used in this Article shall be construed as defined in this section, unless from the context a different meaning is intended or unless a different meaning is specifically defined and more particularly directed to the use of such words or phrases:

* * * * * * * * *

(g) "ENGAGED IN BUSINESS" shall mean the conducting, managing or carrying on of any profession, trade, calling, occupation or commercial enterprise in the City licensed under the provisions of this Article as owner, officer, agent, manager, employee, servant or lessee of any of them.

* * * * * * * * *

(i) "GROSS RECEIPTS" except as otherwise specifically provided the term "gross receipts" as used in this Article shall mean the gross receipts of the calendar year and is defined as follows:

The total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, whether such service, act or employment is done as a

part of or in connection with the sale of goods, wares, merchandise or not, for which a charge is made or credit allowed including all receipts, cash, credits and property of any kind or nature, any amount for which credit is allowed by the seller to the purchaser without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses or any other expense whatsoever; provided, that cash discounts, allowed or taken on sales shall not be included, and this Article shall not be construed to impose any tax upon any business or transaction which the City is not authorized to license or tax under any law of the State of California or of the United States. Any tax required by law to be included in or added to the purchase price and collected from the consumer or purchaser, and such part of the sales price of any property previously sold returned by the purchaser to the seller which is refunded by the seller by way of cash or credit allowances given or taken as part payment on any property so accepted for resale, shall be deducted for the purpose of determining gross receipts hereunder.

* * * * * * * * *

(p) "PERSON." The word "person" shall mean all domestic and foreign corporations, associations, syndicates, joint stock companies, partnerships of every kind, clubs, Massachusetts business or common law trusts, societies and individuals engaged in any business as defined herein, in the City of Los Angeles.

* * * * * * * * *

(s) "SALE." "SELL." The words "sale" and "sell" shall be deemed to include and refer to: the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal property for a price, and to

the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall likewise be deemed a sale. The foregoing definitions shall not be deemed to exclude any transaction which is or which, in effect, results in a sale within the contemplation of law.

(t) "SELLING GOODS, WARES AND MERCHANDISE." The phrase "selling goods, wares and merchandise" shall, in addition to any other meaning established at law, be deemed to extend to and include in its application persons who engage in the business of fabricating, serving or supplying, for a price, tangible personal property furnished, produced or made at the special order of purchasers or consumers, or for purchasers or consumers who do or who do not furnish, directly or indirectly, the specifications therefor.

* * * * * * * * *

Sec. 21.10. PERMIT REQUIREMENTS.

No person shall engage in any business, profession, trade or occupation or perform any act, required to be licensed under the provisions of this Article until such license is first obtained. No license, other than a renewal license, shall be issued hereunder when the provisions of some other Article of this Code or of any other ordinance of this City require a permit to be obtained or to be applied for as a prerequisite to entering into or performing any such business, profession, trade, occupation or act, until such permit is first so applied for or

obtained, as the case may be. Any license issued in violation of this section shall be void.

Sec. 21.11. SUIT FOR RECOVERY OF UNPAID SUMS.

Any sum required to be paid hereunder shall be deemed a debt to the City and any person who engages in any business required to be licensed without first obtaining a license so to do, shall be liable to an action by and in the name of the City of Los Angeles in any court of competent jurisdiction for the recovery of any such amount.

* * * * * * * * *

Sec. 21.18. All license fees shall be paid in advance to the City Clerk in lawful money of the United States, and in all cases where the amount of license fee is based upon gross receipts, such fee shall be ascertained by and computed upon the gross receipts of the preceding calendar year; and where such fee is based upon the number of barrels of oil pumped or produced, such fee shall be ascertained by and computed upon the number of barrels of oil pumped or produced during the next preceding license period; in all other cases such fee shall be ascertained by a strict construction of the provisions of this article applicable to the particular business.

* * * * * * * * *

Sec. 21.20. Licenses required hereunder shall be due and payable at the following times:

(a) Annual licenses on the 1st day of January of each year;

(b) Semi-annual licenses on the 1st day of January and the 1st day of July of each year;

(c) Quarterly licenses on the first days of January, April, July and October of each year;

(d) Monthly licenses on the first day of each and every month;

(e) Daily licenses in advance on each day;

All such licenses shall be valid for the period issued.

* * * * * * * * *

Sec. 21.49. Subject to the provisions of all of the preceding sections of this Article, a license is required to be obtained by every person engaged in any of the businesses, trades, callings or professions specified in the following sections of this Article; and for such license a tax is hereby imposed in the amount prescribed in the applicable section.

* * * * * * * * *

Sec. 21.166. (As amended by Ord. No. 92,989, effective April 14, 1948). Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition thereto, the sum of 40c per year for each additional $1,000 of gross receipts, or fractional part thereof, in excess of $20,000; provided, however, that blind persons need not include the first $20,000 of gross receipts in the computation of the amount of tax due hereunder, nor be required to pay the minimum fee of $8.00. This exemption shall not subject such blind person to the provisions of Sec. 21.190 of this Code.

A blind person, within the meaning of this section, shall mean a person having not more than 10% visual acuity in the better eye, with correction. Such blindness shall

be certified by a licensed physician and surgeon who specializes in diseases of the eye, or by the Bureau of Vocational Rehabilitation of the Department of Education of the State of California, and the exemption provided by this section shall not apply until a certificate as to such blindness shall be furnished the City Clerk.

* * * * * * * * *

Sec. 21.168.1. Nothing in Sections 21.166, 21.167 or 21.168 contained shall be construed to require the inclusion of the amount of the sales of goods sold outside of the State of California in the computation of the amount of tax due thereunder.

* * * * * * * * *

Sec. 21.190. (As amended by Ord. No. 90,555, Ord. No. 90,736 and Ord. No. 91,411). (a) Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $12.00 per calendar year or fractional part thereof for the first $12,000 or less of gross receipts, and in addition thereto, the sum of $1.00 per year for each additional $1,000 or fractional part thereof, of gross receipts in excess of $12,000.

* * * * * * * * *

(d) When the gross receipts are derived from or attributable to sources both within and without the city, the license tax imposed by this section shall be measured by the gross receipts derived from or attributable to sources within this city. Such gross receipts shall be determined by an allocation upon the basis of pay roll, value and situs of tangible property, general expenses,

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or by reference to any of these or other factors, or by such other method of allocation as is fairly calculated to determine the gross receipts derived from or attributable to sources within this city. Gross receipts attributable to isolated or occasional transactions at places outside the city but within the State of California, where the licensee is not engaged in business shall be considered as gross receipts derived from or attributable to sources within this city. Gross receipts derived from or attributable to sources within this city include (a) gross recepits from tangible or intangible property located or having situs in this city and (b), when not contrary to law, gross receipts from any activities carried on in this city regardless of whether carried on in interstate, intrastate or foreign commerce.

Allocation formulae designed to carry into effect the purpose of this subsection shall be adopted by the City Clerk by rules and regulations. The City Clerk is hereby authorized in the application to individual cases of such rules and regulations and the formulae therein contained, to make such modifications in formulae as may be necessary to carry out the intent of this subsection.

If the City Clerk reallocates gross receipts upon his examination of any return, he shall, upon the written request of the licensee, disclose to him the basis upon which the reallocation has been made.

* * * * * * * * *

NOV 30 1954
HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

October Term, 1954.

No. 415

BALLEROCK OIL COMPANY, a California corporation,

Appellant,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

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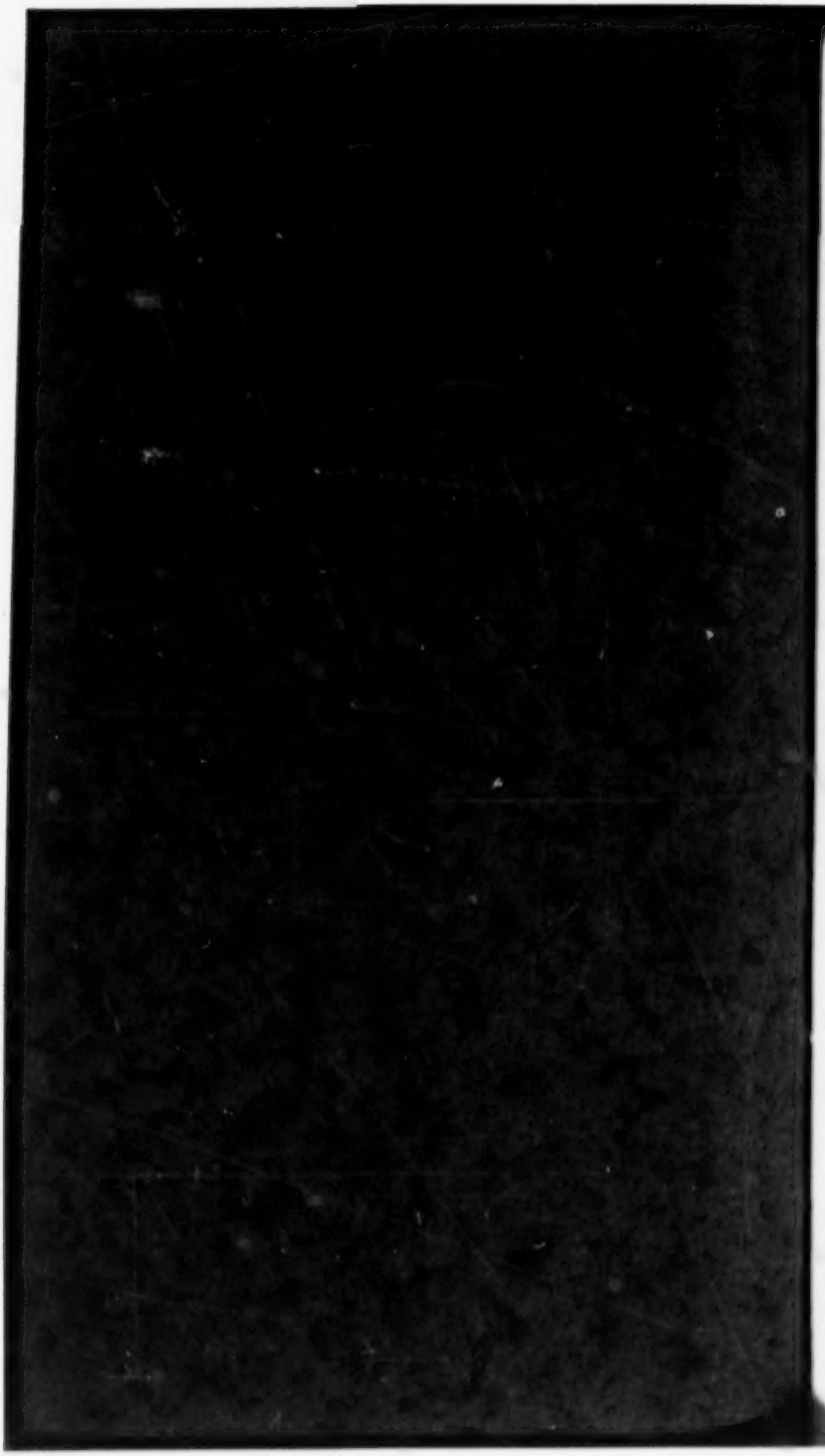

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 415

BELRIDGE OIL COMPANY, a California corporation,
Appellant,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Appellee.

On Appeal From the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

Finality of Judgment.

The first jurisdictional question to be decided on this appeal is whether the judgment appealed from is final within the meaning of 28 U. S. C., Section 1257. That question was raised and discussed at some length in appellant's Jurisdictional Statement, at pages 5 to 14.

Appellee states, at pages 3 and 4 of its Motion to Dismiss, merely that it does not question the Court's jurisdiction on the ground of lack of finality of the judgment. Appellee does not, however, give any reason or citation which would indicate that the judgment of the

California Supreme Court is final within the meaning of 28 U. S. C., Section 1257.

It is submitted that the judgment of the California Supreme Court lacks the finality which is requisite to this Court's jurisdiction.

The following discussion of the second jurisdictional question is based upon the assumption, contrary to appellant's belief, that the judgment of the California Supreme Court is final within the meaning of 28 U. S. C., Section 1257.

Federal Question.

The jurisdictional question raised by appellee in its Motion to Dismiss is itself a constitutional question which will be reached and decided only if this Court's jurisdiction cannot be determined on a non-constitutional ground. (*Alma Motor Co. v. Timken-Detroit Axle Co.* (1946), 329 U. S. 129.) The question of whether this appeal raises a Federal question necessarily involves a determination of whether the prohibitions of the Fourteenth Amendment to the Constitution of the United States extend to the municipal tax involved in this case.

Appellant contends that Section 21.166 of the License Ordinance of the City of Los Angeles violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States if that section is applied so as to impose a tax based upon a larger portion of appellant's gross receipts than is fairly attributable to the small portion of its activities conducted within the City. (U. S. C., Const., Amend. 14, Sec. 1; Ord. 77,000, Chap. 2, Art. 1 of the Los Angeles Mun. Code.)

It is inherent in appellant's contention that neither the State of California nor the City of Los Angeles has the power under the Fourteenth Amendment to tax appellant's Kern County activities for the benefit of the City of Los Angeles. The question is not, as indicated by appellee's Motion to Dismiss, whether the amount of the tax claimed by appellee could have been validly imposed by the State. The question is whether this particular tax, for the particular purposes and under the circumstances obtaining in this case, violates the due process and equal protection clauses of the Fourteenth Amendment. (*Postal Telegraph-Cable Co. v. Taylor* (1904), 192 U. S. 64; *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6* (1921), 256 U. S. 658.)

Postal Telegraph-Cable Co. v. Taylor, supra, involved a municipal ordinance which purported to impose a license fee of about $200 on the telegraph company as a police measure. Although the Pennsylvania Supreme Court had held the ordinance valid and although the State of Pennsylvania could have imposed a tax in that amount upon the telegraph company as a revenue measure, this Court held the ordinance void because the tax was unreasonable and excessive as a municipal levy for the particular purpose involved in that case.

In *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6, supra,* a local assessment for a road improvement had been upheld by the Supreme Court of Arkansas. Although the amount of the assessment might have been validly imposed as a state revenue measure upon the railroad, this Court held the statute enabling the local assessment for the particular improvement void under the circumstances of that case as being a violation of the equal protection clause of the Fourteenth Amendment.

The tax claimed by appellee is an attempted extra-territorial extension of its taxing power in violation of the due process clause of the Fourteenth Amendment under the cases cited at pages 15 to 20 of appellant's Jurisdictional Statement.

The tax claimed by appellee also violates the equal protection clause of the Fourteenth Amendment because it discriminates against taxpayers doing business within more than one taxing jurisdiction. If a tax under Section 21.166 of the License Ordinance may be imposed upon the total gross receipts of appellant's "selling" business conducted only partly within the City of Los Angeles, then another tax could be imposed in Kern County upon the same total gross receipts. Similarly, if appellant's "selling" business were conducted in three different taxing jurisdictions, it could be subjected to three taxes, each upon its total gross receipts. The same "selling" business, however, would be subject to only one such tax if all its activities were conducted within one taxing jurisdiction. The same business conducted partly in each of two or three taxing jurisdictions would derive no more protection and benefit in the aggregate from the two or three local governments than it would from one local government if conducted wholly within one taxing jurisdiction. The taxation by one taxing jurisdiction of a larger portion of a taxpayer's business than is conducted within the jurisdiction necessarily results in discrimination and a denial of equal protection of the laws. (*Security Truck Line v. City of Monterey* (1953), 117 Cal. App. 2d 441, 256 P. 2d 366, rehear. den. 257 P. 2d 755.)

Owensboro Waterworks Company v. Owensboro (1906), 200 U. S. 38, is not in point in this appeal. There,

the Supreme Court held that the failure of a municipality properly to discharge its duties under valid legislative enactments was a violation only of the state laws and not a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court pointed out that

> ". . . It is not contended that the legislative enactments by the authority of which the city intends to establish and maintain a system of waterworks are inconsistent either with the constitution of Kentucky or the Constitution of the United States . . ." (200 U. S. at 45.)

The validity of a legislative enactment, not the legality of administration under a valid enactment, is in issue in this proceeding.

Keokuk Bridge Co. v. Salm (1922), 258 U. S. 122, is helpful to appellant, to the extent it has a bearing on this appeal. There, suit was brought in a United States District Court to enjoin county officials from collecting a county real property tax based upon an assessment alleged to deny substantive due process and equal protection of the laws in violation of the Fourteenth Amendment. On direct appeal from the District Court, the Supreme Court held that the District Court had jurisdiction although diverse citizenship did not exist, and affirmed the decree of the District Court dismissing the bill for want of equity, on the grounds that the plaintiff had an adequate remedy at law and that plaintiff had not alleged tender of the amount of taxes equitably due. The existence of a Federal question for the jurisdictional purposes of this appeal is supported by the *Keokuk* case.

Wells, Fargo & Co. v. Nevada (1918), 248 U. S. 165, has no apparent bearing on this appeal. There, this Court held that a Nevada property tax did violate the commerce clause and that the taxpayer had not been denied procedural due process. Appellant has not raised, and does not now raise, any question of procedural due process.

Conclusion.

It is submitted that the motion of appellee to dismiss for lack of a substantial Federal question should be denied.

Respectfully submitted,

VERNON BARRETT,
Counsel for Appellant.

F. C. LOWELL HEAD,
Of Counsel.

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vs.

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Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

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IN THE

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October Term, 1954.

No. 415.

BELRIDGE OIL COMPANY, a California corporation,
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vs.

CITY OF LOS ANGELES, a municipal corporation,
Appellee.

MOTION TO DISMISS.

The City of Los Angeles, a municipal corporation, appellee herein, respectfully moves that the appeal of Belridge Oil Company, a California corporation, be dismissed.

The basis of this motion is that no substantial federal question is presented.

The question decided by the Supreme Court of California, and reported in 42 Cal. 2d 823, 271 P. 2d 5, is simply that, under the laws of California, The City of Los Angeles has the power to impose the license tax in question. Thus a purely local state question is involved. No claim was made by appellant that if the State of

California itself, as distinguished from one of its state agencies, had imposed the license tax that the Constitution of the United States would be violated. In fact, the action of The City of Los Angeles in adopting and enforcing the license tax ordinance is "state action" as far as this Honorable Court is concerned. (*Lovell v. Griffin,* 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949.)

All activities of appellant having a bearing upon the imposition and computation of the tax occurred in the State of California. No question of interstate commerce is involved in this case. Appellee respectfully submits that the absence of a federal question in the case at bar is clear under the authority of *Owensboro Water Works Co. v. Owensboro,* 200 U. S. 38, 26 S. Ct. 249, 50 L. Ed. 361. That case furnishes a clear parallel. There an injunction was asked to restrain the City from allegedly using in an improper manner certain funds derived from the sale of bonds. On page 46 of the official report this Honorable Court stated as follows:

> "The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the City possessed. But this does not of itself show that they acted without the due process of law enjoined by the 14th Amendment; for, if what is complained of had been done directly by the state or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the Amend-

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ment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that act."

The ordinances of The City of Los Angeles and the laws of the State of California have provided an ample opportunity to question both the amount of the tax sought to be collected and the authority of The City of Los Angeles to collect it. Where such opportunity exists there is no deprivation of property without due process and no denial of equal protection of the law.

Keokuk Bridge Co. v. Salem, 258 U. S. 122, 42 S. Ct. 207, 66 L. Ed. 496;

Wells Fargo & Co. v. Nevada, 248 U. S. 165, 39 S. Ct. 62, 63 L. Ed. 190.

Finality of Judgment.

Appellant states that this appeal is taken as a precautionary measure (Jurisdictional Statement, p. 5), basing its position on the possibility that the decision of the State Supreme Court (42 Cal. 2d 823, 271 P. 2d 5) has the effect of being a final judgment within the meaning of 28 U. S. C. A. 1257.

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80.

Since appellee takes the position that the decision of the State Supreme Court, properly construed, leaves only ministerial acts to be performed by the Superior Court

when it enters its judgment, nothing in this motion should be construed as questioning the jurisdiction of this Honorable Court on this ground.

It is respectfully submitted that the appeal should be dismissed for lack of a substantial federal question.

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

and

JAMES A. DOHERTY,
Assistant City Attorney,

Attorneys for Appellee.

No. 415. BELRIDGE OIL CO. *v.* CITY OF LOS ANGELES. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Vernon Barrett* for appellant. *Roger Arnebergh* and *Bourke Jones* for appellee. Reported below: 42 Cal. 2d 823, 271 P. 2d 5.